New Jersey Law Journal

VOL. CXCVII - NO.11 - INDEX 875 SEPTEMBER 14, 2009 ESTABLISHED 1878

Control the Urge To Tell All

Be candid but not confessional

By Kenneth F. Oettle

In the legal profession, candor is a sine qua non. If you are deemed trustworthy, your position will be given due consideration. If you are deemed untrustworthy, everything you say will be doubted.

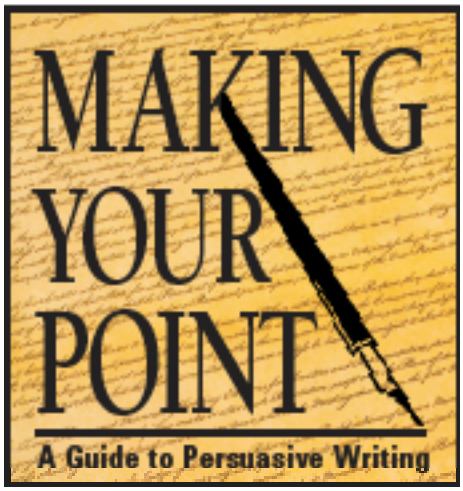
This is true in communicating not only with courts and administrative agencies but also with adversaries, allowing, of course, for the inevitable posturing (representing greater strength than you have) and prevarication (lying about what you are willing to give or take to settle the case). Generally, if you wish to be believed, you have to tell the truth.

But you don't have to tell the whole truth. Some truth will hide behind the attorney-client privilege, and some will be left for adversaries or regulators to bring out, if at all. How much non-privileged truth to reveal will vary, but parameters can be set.

In litigation, you must address cases in point, and you must confront your worst facts. Otherwise, the reader will assume you are avoiding what you cannot explain.

On the other hand, you need not state the obvious where it is bad for you. Assigning attorneys typically delete passages like the following from draft briefs:

> Though courts are reluctant to grant motions for leave to appeal, leave should be granted here because ... .



Dicta may say that courts are reluctant to grant motions for leave to appeal, but an assigning attorney would prefer that you not give the other side, and the court, the opportunity to say, "As defendant acknowledges, motions for leave to appeal are rarely granted." A bad ruling should not appear to issue from your own mouth.

Similar reasoning applies in a regulatory context, where you seek licenses and other approvals. Be forthcoming to a fault, but don't be gratuitously confessional.

Suppose, for example, that you represent a gaming company that innocently did business with a vendor who turned out to have connections to organized crime. The company's Director of Compliance (Callahan) performed a standard investigation of the vendor (Smith). He required Smith to submit a personal disclosure form, searched for and found no criminal record, confirmed Smith's graduation from college, and checked his personal references. He followed standard procedures and discovered nothing out of the ordinary.

He did not, however, investigate Smith's other businesses after a Dun & Bradstreet report provided no meaningful information about them because Smith had previously worked for a company licensed to provide casino entertainment. Ostensibly, Smith had been vetted.

You now have to explain to the gaming regulators what went wrong. In your draft report, you not only list what Callahan did, but you go a step further and mention what Callahan did not do. The draft read as follows (the emphasis is mine):

> Smith claimed to be the head of his musical promotion businesses for15 years. Callahan ordered a Dun & Bradstreet report on Smith's other businesses, but it came back with no meaningful information. **Callahan did not otherwise investigate Smith's businesses, so he did not learn who Smith's associates were in those businesses. Callahan acknowledges that his investigation of Smith could have been more thorough; however, this is with hindsight.** Callahan performed a standard investigation of Smith (e.g.,

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> criminal background check, confirmation of academic record, contact with references) but took no extraordinary measures in view of Smith's former association with XYZ Corp., which was licensed to do business with the casinos.

Your intent is to show that gaming company acted diligently, applying its standard procedures, and that it was surprised to find that Smith had connections to organized crime. A recitation of the steps taken by the company's Director of Compliance supports this purpose.

Whether to articulate ways in which Callahan's investigation could have been more thorough is a tactical decision. Being forthcoming with regulators is paramount; probably the dominant factor in a regulatory context, but "forthcoming" has degrees.

Callahan could have dug deeper into Smith's other businesses — one can always do more — but he made a reasonable decision not to. If the regulators did not ask what else Callahan could have done, think twice about going down that road (assuming you aren't proposing to revise the company's internal controls to prevent a reoccurrence). If you begin the speculation, they are likely to finish it, finding other ways in which the investigation could have been more thorough. That is their job, as surely as it is your job to show that Callahan was diligent.

Accuracy and completeness are crucial in dealing with courts, regulators, adversaries and, frankly, anyone, but you have to be wary of triggering concerns that might otherwise not arise. Sharing your speculations may be cathartic, but that isn't your goal.

Before the report was submitted to the regulators, the highlighted sentences were deleted. The report did not say what Callahan didn't do, and it did not say that he could have been more thorough. On the other hand, neither did it suggest that his investigation could be judged only with hindsight. That would have been an excuse that the regulators didn't want to hear.

The draft report illustrates one of the subtleties of the advocate's role: "selective sharing." Lawyers sometimes reveal too much, creating problems internally, with assigning attorneys and clients, and externally, with courts and adversaries. On the other hand, revealing too little can destroy credibility and raise ethical issues. So where do you draw the line?

Lawyers differ on that. Some view advocacy as a negotiation: "Ask for more than you think you can get; never bring out a bad fact; and concede nothing. Make every point you can think of because you never know what will 'float the court's boat.'"

These advocates figure that if they give the court an argument to reject, like a throwaway in a negotiation, the court will be more inclined to rule for their client on the key issue. Lawyers from this school seem almost oblivious to the risk they create to their credibility by asking for the moon, arguing everything, and conceding nothing.

I don't like the hard stance, but I look for the rationale behind it (it wouldn't be a common stance if it didn't sometimes have value). Here, the deleted language seemed unnecessary. Confessions can be appropriate, but not in the middle of a recitation of what your client did right.

Puzzler

How would you tighten and sharpen the following sentence?

> The ruling of the trial court that defendant breached all of the covenants was affirmed by the Appellate Division.

Look to eliminate prepositional phrases. If the phrase indicates possession ("of the trial court"), use a possessive ("trial court's"). If the phrase indicates causation ("by the Appellate Division"), make the actor the subject of the sentence.

In most instances, use "all" rather than "all of."

The revised version: The Appellate Division affirmed the trial court's ruling that defendant breached all the covenants.■